

**A Mohd Najib bin Hj Ahmad v
Lembaga Padi dan Beras Negara**

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-640
OF 1996

B SITI NORMA YAAKOB, ABU MANSOR AND HAIDAR JJCA
7 SEPTEMBER 1998

C *Civil Procedure — Pleadings — Findings on matters not pleaded — Statement of claim did not aver to general orders relied on by appellant — Show cause letter and subsequent correspondence referred to general orders — Trial judge held that appellant could not question respondent's action under general orders due to omission to so aver in statement of claim — Whether trial judge had erred*

Evidence — Witness — Plaintiff was sole witness to give oral evidence — No other witnesses called — Whether plaintiff had proved his case — Whether trial judge was wrong in concluding that appellant called no witness

D *Public Servants — Dismissal — Termination of service — Consideration of extraneous material — No opportunity for appellant to rebut — No explanation as to what information was considered by disciplinary committee — Whether this had prejudiced appellant — Whether such misdirection had occasioned a miscarriage of justice*

E The appellant was employed by the respondent as an Assistant Enforcement Director in 1972. He held the position of Assistant Director of Training when he was dismissed. Disciplinary proceedings were commenced against the appellant by way of a letter from the respondent's disciplinary committee ('the committee') to show cause why disciplinary action should not be taken against him following investigations carried out by the committee in respect of four complaints received against him. The committee decided that the charges were made out and imposed punishments on the appellant pursuant to the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 ('the 1980 general orders'). The appellant appealed to the respondent but the appeal was dismissed and the punishments were substituted with dismissal from service. The appellant then filed his suit. At the trial, he was the only one giving evidence. The trial judge dismissed the appellant's claim and the appellant appealed. The appellant attacked the trial judge's findings that: (i) the appellant had called no witness to testify on his behalf; and (ii) the appellant could not contend that the respondent had no authority to take any disciplinary action against him under the 1980 general orders as no averment was made in the appellant's amended statement of claim as to his reliance on the general orders. The appellant also submitted that there had been a denial of the doctrine of substantive fairness in proceedings before the committee when it took into account matters of which the appellant had no notice of and for which he had no opportunity to reply.

Held, allowing the appeal:

- (1) The fact that the oral evidence came from the appellant himself and not from any other third party called on his behalf did not entitle the judge to conclude that the appellant called no witness whatsoever as he was as much a witness as any other person called to testify on his behalf (see p 430D–E).
- (2) The omission to aver to the 1980 general orders in the amended statement of claim was a non-issue as both parties were aware that the dispute over the appellant's dismissal stemmed from proceedings under the provisions of the 1980 general orders (see p 430H–I).
- (3) The respondent had every opportunity to explain what other relevant information was considered by the committee at the trial but they opted to remain silent. The words 'lain-lain maklumat yang berkaitan' in its letter to the appellant must mean that extraneous material had been taken into account without giving the appellant the opportunity to comment or rebut. The trial judge had not directed her mind to that aspect of the case and this omission was a misdirection which had occasioned a miscarriage of justice (see p 432A–D).

[Bahasa Malaysia summary

Perayu telah diambil bekerja oleh penentang sebagai Pembantu Pengarah Penguatkuasaan dalam tahun 1972. Beliau memegang jawatan Pembantu Pengarah Latihan ketika beliau diberhentikan. Prosiding tatatertib telah dimulakan terhadap perayu melalui sepucuk surat daripada jawatankuasa tatatertib penentang ('jawatankuasa tersebut') untuk menunjukkan sebab mengapa tindakan tatatertib tidak seharusnya diambil terhadap beliau berikutan dengan siasatan yang dijalankan oleh jawatankuasa tersebut berhubung dengan empat aduan yang diterima terhadap beliau. Jawatankuasa tersebut memutuskan bahawa tuduhan-tuduhan itu dibuat dan mengenakan hukuman ke atas perayu menurut Perintah-Perintah Am Pegawai-Pegawai Awam (Kelakuan dan Tatatertib) (Bab D) 1980 ('perintah-perintah am 1980'). Perayu telah merayu kepada penentang tetapi rayuan telah ditolak dan hukuman-hukuman telah digantikan dengan pemecatan daripada perkhidmatan. Perayu kemudiannya telah memfailkan guamannya. Di perbicaraan, beliau adalah satu-satunya orang yang memberikan keterangan. Hakim perbicaraan telah menolak tuntutan perayu dan perayu telah merayu. Perayu telah membantah keputusan hakim perbicaraan bahawa: (i) perayu telah tidak memanggil sebarang saksi untuk memberi keterangan bagi pihaknya; dan (ii) perayu tidak boleh menegaskan bahawa penentang tidak mempunyai kuasa untuk mengambil sebarang tindakan tatatertib terhadap beliau di bawah perintah-perintah am 1980 kerana tiada penegasan dibuat dalam pernyataan tuntutan perayu berhubung dengan perintah-perintah am tersebut terhadap mana beliau telah

A bergantung. Perayu juga berhujah bahawa terdapatnya penafian akan doktrin keadilan substantif dalam prosiding di hadapan jawatankuasa tersebut ketika ia mengambil kira perkara-perkara yang perayu tidak ketahui dan bagi yang mana beliau tiada peluang untuk menjawab baginya.

B **Diputuskan**, membenarkan rayuan:

- C** (1) Hakikat bahawa keterangan lisan datang daripada perayu sendiri dan bukannya daripada mana-mana pihak ketiga yang dipanggil bagi pihaknya tidak memberi hak kepada hakim untuk memutuskan bahawa perayu telah tidak memanggil sebarang saksi sama sekali kerana beliau sendiri merupakan seorang saksi sepertimana orang-orang lain yang dipanggil untuk memberi keterangan bagi pihaknya (lihat ms 430D–E).
- D** (2) Peninggalan untuk menegaskan perintah-perintah am 1980 dalam pernyataan tuntutan terpinda bukannya merupakan satu isu kerana kedua-dua pihak mengetahui bahawa pertikaian ke atas pemecatan perayu berpunca daripada prosiding di bawah peruntukan perintah-perintah am 1980 (lihat ms 430H–I).
- E** (3) Penentang mempunyai setiap peluang untuk menjelaskan apakah maklumat lain yang relevan telah dipertimbangkan oleh jawatankuasa tersebut di perbicaraan tetapi mereka membuat pilihan untuk berdiam. Perkataan ‘lain-lain maklumat yang berkaitan’ dalam suratnya kepada perayu seharusnya bermakna bahawa bahan yang lebih telah diambil kira tanpa memberikan perayu peluang untuk memberikan ulasan atau mematahkannya. Hakim perbicaraan telah tidak menumpukan perhatiannya kepada aspek kes itu dan peninggalan ini adalah satu salah arah yang menyebabkan salah laksana keadilan (lihat ms 432A–D).]
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Notes

- G** For a case on findings on matters not pleaded, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 3539.
For cases on witness, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1635–1737.
For cases on termination of service, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1556–1560.

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Cases referred to

- B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169 (refd)
Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697 (refd)
Raja Abdul Malek Muzaffar Shah bin Raja Shahrulzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 CLJ 619 (refd)
Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor [1990] 3 MLJ 364 (refd)

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Legislation referred to

Lembaga Padi Dan Beras Negara Act 1971 s 10(1), (3)
Public Officers (Conduct and Discipline) (Chapter D) General
Orders 1980 general orders 4(2)(c)(i), (ii), 5(1)(a), (b), (c), (4),
36(a), (b), (g)

Appeal from: Civil Suit S4-21-76 of 1993 (High Court,
Kuala Lumpur)

PM Mahalingam (SG Lingam with him) (SG Lingam & Co) for the
appellant.

Shakir Hussain (Mohamed Noor Don & Associates) for the respondent.

Siti Norma Yaakob JCA (delivering judgment of the court): This appeal arises from a wrongful dismissal suit brought by the appellant against his employer, the respondent, wherein the appellant impeached the respondent's decision made on 25 September 1990 that confirmed an earlier decision made by its disciplinary committee that found the appellant guilty of the charges levelled against him and substituted the punishments meted by the disciplinary committee to one of dismissal. In his civil suit, the appellant's principal prayer is for a declaration that the respondent's decision dated 25 September 1990 is null and void and that he be reinstated to his former position as the Assistant Director of Training in the respondent's employment without any loss of seniority or promotion.

The appellant was employed by the respondent in November 1972 as an Assistant Enforcement Director and confirmed in that position in 1973 and placed in the permanent and pensionable establishment. In 1980, he was promoted to hold the position of Senior Assistant Director in charge of marketing. Later, he assumed the post of Assistant Director with special powers and in 1982, he was transferred to the respondent's training section and held the position of an Assistant Director of Training until he was dismissed on 25 September 1990.

Disciplinary proceedings were first commenced against the appellant in early 1990 when he received a letter dated 7 February 1990 from the respondent's disciplinary committee. In that letter, the appellant was asked to show cause why disciplinary action with a view to his dismissal should not be taken against him following investigations carried out by the disciplinary committee in respect of four specific complaints received by the disciplinary committee against him. These complaints relate to his active involvement in a series of lectures on milling technology, held between 29 to 31 May 1989, at Hotel Equatorial, Penang. The training course was organized and conducted by a company, Netwin Sdn Bhd ('the company') of which he was one of four directors. A participant in that course was charged RM300 by the company. The appellant is alleged to have used his official position to officially declare the training course open and had also lectured to the course participants. By his acts and omissions, the disciplinary committee found that he had:

- (1) failed to disclose to the respondent that he had been a director of the company since 4 January 1989;

- A** (2) failed to obtain written permission from the respondent of his involvement with the company;
- (3) utilized his approved leave during the period of 29 May–18 June 1989 to be directly involved in the activities of the company, namely his active participation in the training course organized and conducted by the company; and
- B** (4) failed to obtain the necessary permission to participate in the same training course.

The appellant was also reminded that as an officer of the respondent, he was bound by the provisions of s 10(1) and (3) of the Lembaga Padi Dan Beras Negara Act 1971 under which he was appointed. The investigations revealed:

- (1) that there had been a conflict of interests between his personal and public duties as an officer of the respondent;
- D** (2) that he had used his official position for his personal gain;
- (3) that he had involved himself either directly or indirectly in the affairs of a company for reward; and
- (4) that without the permission of the respondent, he had utilized his approved leave to engage himself in personal activities for reward.

E The appellant was told that his aforesaid conduct was in breach of general orders 4(2)(c)(i) and (ii); 5(1)(a), (b), (c) and 5(4) of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 ('the 1980 general orders'), for which he was liable to be disciplined. He was given 14 days from the date of receipt of the letter to reply to the aforesaid charges.

F The appellant received the show cause letter on 8 February 1990 and he responded by way of his letter dated 21 February 1990. In it, he practically admitted to all the wrongdoings but contended that his actions were motivated by the noble intention of assisting a bumiputra company in disseminating knowledge of a subject of which he had the experience and technical know-how. He received no reward either in cash or in kind for his services.

G The disciplinary committee met on 7 March 1990 and after considering the charges against the appellant, his reply to the charges and other relevant factors, decided that the charges were made out and imposed the following punishments on the appellant pursuant to general order 36(a), (b) and (g) of the 1980 general orders:

- H** (1) a warning;
- (2) a reprimand; and
- (3) a reduction of three salary points based on the salary scale of grade A22 for three years with effect from 1 April 1990 until 31 March 1993.

I The decision of the disciplinary committee was made known to the appellant by letter dated 13 March 1990 and the appellant was given 14 days to appeal to the respondent.

The appellant did so by his letter dated 14 March 1990 addressed to the respondent but confined his appeal to that part of the punishment relating to the reduction in his salary. The respondent met on 12 June 1990 to consider the appeal and after weighing all matters, dismissed the appeal and substituted the punishments imposed by the disciplinary committee with one of dismissal from service pursuant to general order 36(i) of the 1980 general orders, to take effect from the date of the letter.

The appellant responded by filing his civil suit on 7 July 1993 and he was represented by solicitors throughout, as was the respondent. At the trial, only the appellant gave oral evidence but he was not cross-examined. The respondent elected not to call any witnesses and on 25 September 1996, the learned trial judge dismissed the appellant's claim with costs.

The first attack on the learned judge's written judgment is her finding that the appellant called no witness to testify on his behalf. We say that this cannot be right as the appellant had been in the witness box and given oral evidence and the notes of proceedings testify to this. The fact that the oral evidence came from the appellant himself and not from any other third party called on his behalf does not entitle the learned judge to conclude that the appellant called no witness whatsoever as he is as much a witness as any other person called to testify on his behalf. In this instance, he relied entirely on his own evidence and we say that in that situation, he had called evidence to prove his case although that evidence came solely from himself. Now whether such evidence is sufficient to prove his case is quite another matter but the fact remains that he gave evidence to support his claims.

In the court below, the learned judge upheld the respondent's objection that the appellant cannot contend that the respondent had no authority to take any disciplinary action against him under the 1980 general orders as no averment was made in the appellant's amended statement of claim as to his reliance on the general orders. In arriving at such a finding, the learned judge reasoned that since parties are bound by their own pleadings, the appellant cannot raise any issue with reference to the 1980 general orders as there is no averment to the general orders in his pleadings.

The object of an averment in a pleading is to give due notice to the other party in the proceedings of the presence of an issue to be raised at the trial so that the other party is well prepared to meet the challenge and not be taken by surprise and the issue litigated in an orderly manner. In the instant appeal, we consider that the omission to aver to the 1980 general orders in the amended statement of claim is a non-issue as both parties were aware that the dispute over the appellant's dismissal stemmed from proceedings under the provisions of the 1980 general orders. This is clear from the respondent's own documentary evidence namely the show cause letter dated 7 February 1990 where at paras 3 and 4, references were made to specific provisions in the 1980 general orders under which the disciplinary action was taken. The respondent's subsequent correspondence on the same subject matter in letters dated 13 March 1990 and 25 September 1990

- A all allude to the 1980 general orders as the authority for acting as they did and under these circumstances, the element of surprise does not arise at all. Here again, the learned judge should not have accepted the respondent's contention that the appellant cannot question the respondent's action in taking disciplinary action under the 1980 general orders on the ground that there had been an omission to aver to the general orders in the
- B appellant's pleading. Clearly, the learned judge fell into error when she upheld the respondent's contention.

- We now come to the more substantial ground of appeal that there had been a denial of the doctrine of substantive fairness in proceedings before the disciplinary committee when it took into account matters of which the
- C appellant had no notice of and for which he had no opportunity to reply. The doctrine of substantive fairness as referred to by Edgar Joseph Jr SCJ in the case of *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697, or procedural fairness as alluded to by this court in the case of *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 CLJ 619, are the
- D new terminologies of what we have all along refer to as the rules of natural justice ie impartiality and fairness. See the Privy Council case of *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169.

- In this aspect, the appellant is not objecting to the fact that he was not present before the disciplinary committee to plead his case when it met on
- E 7 March 1990 to deliberate on the matter of his dismissal. What is being questioned is that the disciplinary committee took into consideration extraneous matters which the appellant had no opportunity to comment or rebut. This is clear from the first paragraph of the letter dated 13 March 1990 addressed to the appellant wherein the disciplinary committee stated as follows:
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Perkara: Tindakan Tatatertib

Jawatankuasa tatatertib (kumpulan A) Lembaga di dalam mesyuarat pada 7 Mac 1990 setelah menimbangkan dengan teliti pertuduhan-pertuduhan ke atas tuan dan jawapan-jawapan yang diberi oleh tuan dan *lain-lain maklumat yang berkaitan*, memutuskan bahawa tuan dikenakan hukuman-hukuman berikut: ... (Emphasis added.)

- G The appellant complains that he does not know what the offending words 'lain-lain maklumat yang berkaitan' refer to and contends that the proper construction to be placed on those words is that prejudicial extraneous material had been taken into consideration and he was not given the
- H opportunity to rebut it.

- The same fact situation was present in the case of *Raja Abdul Malek Muzaffar Shah*, which was also a wrongful dismissal case. In that case, this court had to consider the meaning of the very same phrase appearing in a letter of dismissal addressed to the plaintiff and it held that the phrase would leave a reasonable man with the distinct impression that the
- I defendants gave weight to certain material information that was never put to the plaintiff. Of course, it was always open to the defendants to have given a full explanation as to what was meant by the critical phrase.

The respondent had every opportunity to explain what other relevant information was considered by the disciplinary committee at the trial but they opted to remain silent and we are only left with the printed words and they must mean what they say, ie extraneous material had been taken into account without giving the appellant the opportunity to comment or rebut. Such extraneous material must have played a part in influencing the disciplinary committee to arrive at its decision to mete three separate forms of punishment against the appellant and we say that reliance on such extraneous material had prejudiced the appellant as he was not given the right of rebuttal. See the case of *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364. On this ground alone the appellant is entitled to succeed on his appeal.

We also notice from the notes of proceedings, that submission on that behalf was made to the learned judge but she has not directed her mind to that aspect of the case and this omission, we say, is a misdirection which we consider had occasioned a miscarriage of justice.

As there had been procedural unfairness in the proceedings before the disciplinary committee, it follows that the respondent's action in affirming the decision of the disciplinary committee cannot be supported as being bad in law and that the punishment of dismissal cannot be upheld as being null and void. As this ground alone is sufficient for us to allow the appeal, we see no purpose of considering the other submission made by Mr Mahalingam, counsel for the appellant, that the respondent had no authority to enhance the punishment meted by the disciplinary committee.

We had accordingly allowed the appeal with costs here and below and entered judgment to the appellant in terms of paras 13(a), (b) and (c) of his amended statement of claim. We also ordered the deposit made in this appeal to be refunded to the appellant.

Appeal allowed.

Reported by David Lai

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